

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7002

To be argued by
William C. Sherr

UNITED STATES COURT OF APPEALS

For the Second Circuit

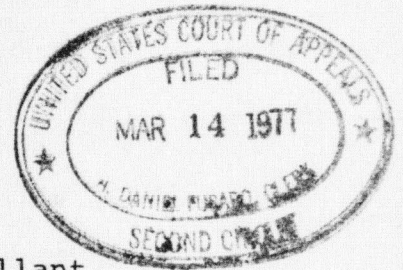
JOHN COLEMAN,

Plaintiff-Appellant,

-against-

GOLKIN, BOMBACK & CO., INC., A
Corporation; and SAUL GOLKIN,

Defendants-Appellees.



On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 77-7002

JOHN COLEMAN,

Plaintiff-Appellant,

-against-

GOLKIN, BOMBACK & CO., INC., A
Corporation; and SAUL GOLKIN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from a decision [A253*], dated
October 18, 1976, by the Honorable John M. Cannella, U.S.D.J.,

* This brief adopts the same system of reference abbreviations as the Brief of Plaintiff-Appellant John Coleman previously submitted herein and hereinafter referred to as "Coleman's brief."

and from an order [A274], dated November 23, 1976, by the Honorable John M. Cannella, U.S.D.J. Said decision and order have not been reported.

STATEMENT OF ISSUES

The Defendants-Appellees, Golkin, Bomback & Co., Inc. (hereinafter "Golkin, Bomback") and Saul Golkin (hereinafter "Golkin"), hereby adopt the Plaintiff-Appellant John Coleman's (hereinafter "Coleman") Statement of Issues as their own.

STATEMENT OF THE CASE

Golkin, Bomback and Golkin hereby adopt Coleman's Statement of the Case as their own, but wish to add that the parties hereto stipulated with the lower court's permission that New York law will control all substantive issues. Tr 138.

STATEMENT OF FACTS

This action was commenced on April 30, 1971 with the filing of a complaint with the United States District Court for the Northern District of Illinois. A3. The filed complaint was subsequently amended (A228) and upon defendants-appellants' application, the matter was transferred to the United States District Court for the Southern District of New York for all purposes.

The amended complaint herein contained four counts and deals generally with a purported violation of a Nominee Agreement entered into between the plaintiff and the corporate

defendant's predecessor in name. A 1.

In its broadest terms, the amended complaint alleged the following violations of Coleman's rights:

- (1) Count I - Breach of contract (to wit, the Nominee Agreement) committed by the defendant-corporation;
- (2) Count II- Violation of certain statutory proscriptions committed by the individual defendant*;
- (3) Count III- Fraudulent conveyance committed by the individual defendant in violation of New York Debtor and Creditor Law §276;
- (4) Count IV- This count is related to Count I in that it seeks to hold the individual defendant derivatively liable for the breach of contract allegedly committed by the corporate defendant under the theory commonly known as "piercing the corporate veil."

The salient operative facts, without repeating the citations offered by Coleman in the Statement of Facts contained in his brief, are as follows:

Divine & Fishman, Inc., (hereinafter "Divine & Fishman") was a New York corporation doing business as a stock brokerage firm. In 1962, Divine & Fishman arranged for the reorganization of Gellman Manufacturing Company (hereinafter "Gellman") according to a plan of reorganization dated April 27, 1962. A 20.

* Although the amended complaint charged a violation of Coleman's alleged rights protected by the New York General Corporation Law §§60 and 61, the District Court properly treated this cause of action as if it arose under the New York Business Corporation Law, §§719 and 720, the successor and contemporary statute.

Divine & Fishman received as compensation for services rendered an option to purchase 50,000 shares of Gellman stock at \$2.00 per share. The option was exercisable between January 1, 1963 and December 31, 1967, both dates inclusive, and embodied other restrictions which, except for a non-assignability clause, were not pertinent for purposes of this proceeding. An option agreement embodying these terms was entered into on August 22, 1962. Ex. 1A-2. Gellman ultimately underwent a corporate reorganization and became known as Amco Industries, Incorporated (hereinafter "Amco").

At approximately the same time as the aforementioned option agreement was executed, the defendant, Saul Golkin, George Golkin, and Milton Bomback began negotiations to merge their stock brokerage business into that of Divine & Fishman by transferring the assets of their partnership for stock in Divine & Fishman. An agreement was reached in the Fall of 1962. A 31. A written agreement was executed on December 12, 1962 embodying the understanding of the parties thereto with the closing to be on December 31, 1962. Ex. 4-1 and 1A-4. According to the agreement, Golkin, George Golkin, and Milton Bomback agreed to purchase and Divine & Fishman agreed to sell a substantial number of shares of Divine & Fishman stock. The consideration to be paid for this stock was set forth in Schedule B. to the agreement and included substantially all of the assets of the buyers' brokerage partnership. In addition,

Divine & Fishman was obliged to repurchase the stock of certain shareholders who were also employees. It was agreed, however, that two of these employees, Robert Albert and Milton Heller, would be allowed to retain their individual interests in certain stock options held by Divine & Fishman and which were given to the employees for services rendered. (The agreement of December 12, 1962 was reviewed by Golkin's attorney, not by Golkin himself, and Golkin never had actual knowledge of this provision. A 135-136, 166-167, 255.) An additional term of the agreement stated that the name Divine & Fishman, Inc. would be changed to Golkin, Divine & Fishman, Inc.

Coleman alleges that he was an instrumental person in arranging the reorganization of Gellman Manufacturing Company. Tr. 37f. Some time in 1963, after the agreement between Divine & Fishman and Golkin, George Golkin, and Milton Bomback had been executed, Coleman allegedly entered into the Nominee Agreement (A1) which stated that Divine & Fishman was holding 10% of the option to purchase shares in Gellman Manufacturing Company (later to become Amco) as nominee for the benefit of Coleman. If the option were exercised, Coleman could participate to the extent of 10% by tendering 10% of the gross exercise price. The document was signed by Seymour Fishman, without authority, on behalf of Divine & Fishman, Inc. even though the company was then known as Golkin, Divine & Fishman, Inc.

ALTHOUGH EXECUTED IN 1963, THE NOMINEE AGREEMENT WAS PREDATED
TO JULY 31, 1962. A 256.

At trial Coleman presented three (3) different versions of the facts surrounding the execution of the Nominee Agreement. During the opening colloquy, Coleman's attorney, Stanley Walton, conceded the predating of the Agreement:

"...the nomination agreement was not executed until after his client [Golkin] bought out the company we had the agreement with. That is a fact." Tr 18.

It is unclear whether Mr. Walton is admitting that the Nominee Agreement was executed after December 31, 1962, the closing date of Golkin's original purchase of stock in Divine and Fishman, or whether he is admitting that the Nominee Agreement was executed after June 1963, when Golkin bought out the individual interests of Divine and Fishman. A 256.

The second version of the facts surrounding the execution of the Nominee Agreement was advanced by Coleman himself. At trial, Coleman stated his belief that the last signature was placed on the Nominee Agreement on July 31, 1962, the date of the Agreement. Tr 41, 67 (1.14).

The third version, also advanced by Coleman himself at trial, begins with the recognition of the possibility that the Nominee Agreement was predated. Tr 68 (11.16-21). The third version ends with Coleman having signed the Agreement on July 31, 1962, but Fishman executing the Agreement in the future. Tr. 91, 92.

In light of the testimony of Marshall L. Burman taken during his deposition of May 17, 1971, only the first version-- that the Nominee Agreement was predated--can be accepted as true. Burman himself drafted the Agreement. A 27. At first, Burman stated that the Agreement was drafted "late in 1962 or early in 1963." A 28. However, this answer was clarified when Burman stated that the Agreement was executed after Golkin acquired his interest in Divine & Fishman. A 42. Therefore, the execution, and perhaps even the drafting, of the Agreement, occurred after December 31, 1962. A 256.

When the Nominee Agreement was executed in 1963 on behalf of Divine & Fishman by Seymour Fishman, the company had ceased to exist under that name. It had undergone a reorganization whereby the brokerage partnership of Golkin, George Golkin, and Milton Bomback, known as Golkin, Bomback & Co., merged into the company and the company changed its name to Golkin, Divine & Fishman, Inc. Golkin became the dominant figure in the organization. A 41.

By Coleman's own admission, he left the employment of Divine & Fishman in July or August of 1962. Tr 65. The aforementioned negotiations, therefore, concerned the of compensation to a former employee who had not been associated with the company for at least four to five months. Furthermore, on July 31, 1962, the alleged date of the Nominee Agreement,

Divine & Fishman was not, in fact, the holder of an option to purchase the Gellman shares as the Agreement states. Divine & Fishman did not acquire this option until August 22, 1962 when an Option Agreement was signed. Ex 1A-2. It is unclear why July 31, 1962 was chosen as the date to which to predate the Nominee Agreement, except that Coleman and Fishman probably thought that the Option Agreement has already been executed by that date. However, it is clear that the intent could only have been to circumvent securing the approval of Golkin and Milton Bomback before entering into the Nominee Agreement. The nominee agreement has the unique effect of purporting to grant an assignment of 10% of something which did not then exist.

Thus, several of Coleman's allegations in his Statement of Facts contained in his brief are misleading. At page 4, the bottom; while Schedule A to Ex. 1A-4 (also Ex. 4-1) does contain the given quote, what Coleman fails to allege is that the same contract also annexed as exhibits the agreements by which two employees, Albert and Heller, obtained the interest in the options held by Divine & Fishman. No proof of Coleman's interest is evident from the December 12, 1962 agreement.

Furthermore, and in connection with the allegation at the top of page 5 of Coleman's brief that Divine & Fishman's pending contracts were made available to Golkin or his attorneys for inspection during the pre-December 12, 1962 period, Coleman

seems to suggest that Golkin, if he had looked, could have discovered the Nominee Agreement during the negotiations for the merger of his brokerage company with Divine & Fishman. This is misleading as well, since, as has been shown herein, the Nominee Agreement was not even drafted until after the merger occurred.

There has not been one scintilla of proof that Golkin ever saw the Nominee Agreement upon which Coleman relies.

It is the alleged breach of the Nominee Agreement which forms the basis of Coleman's action. No notice of the execution of said agreement was given to Golkin and same was kept secret. Tr 122-123. At about the same time in 1963, Golkin, Divine & Fishman, Inc. became known as Golkin, Bomback & Co., Inc. when Harold Divine and Seymour Fishman sold out their interests in the company. In 1965, Golkin adopted a plan of liquidation and proceeded to liquidate its assets. Ex 4-3. By 1967, the only remaining asset of Golkin, Bomback was the unexercised Gellman/Amco option (A 157) which could not be liquidated because of the non-assignability clause. The shareholders agreed that in accordance with the plan of liquidation, an offer to participate in the option would be made to each shareholder according to his pro-rata interest and that Golkin, Bomback would serve as nominee for those who accepted the offer to participate. A 184-185. Bernard Kanton, although not a

shareholder, was offered a chance to participate in consideration of services rendered as counsel to Golkin, Bomback. A 206, 271. Coleman's brief, at p.8, seems to suggest an underhanded motive in the granting of a participation interest to Kanton. This is not the case.

Sometime before the Gellman/Amco option was exercised, Robert M. Albert (hereinafter "Albert") contacted Golkin to inform him of Albert's ten (10%) percent interest in the option. A 97, 167. Albert had been kept informed of the status of his interest through the inquiries of his attorney. A 94. When Albert claimed a 10% interest in the Gellman/Amco option, Golkin did not dispute Albert's contention. Golkin did not ask Albert to prove his interest. Golkin did not view the option as a foolproof investment and was glad to spread the risk. A 167-168, 190-191. Tr 120-122. During the period in question, stocks had generally proved to be a sound investment, and Golkin, having made prior successful investments, was willing to speculate with some of those profits on the Gellman/Amco option. Tr 121.

In late December of 1967, Golkin, Bomback exercised the Gellman/Amco option on behalf of those individuals who accepted the offer to participate. The shares were held until early in 1971 and were sold with the proceeds of the sale being distributed directly to the individuals who had participated in the exercise

of the option and in accordance with the plan of liquidation.
A 212-213.

After the sale of the Amco stock was consummated and the profit realized, Coleman for the first time came forward with an offer to tender his share of the gross exercise price and expected to receive his pro-rata share of the proceeds. When the recipients of the proceeds refused to tender Coleman's share, Coleman instituted this action against Golkin and Bomback and Golkin. Tr. 78.

A bench trial of this action was conducted on August 4, 1975. Tr 1. The Honorable Judge John M. Cannella rendered a written opinion dated October 18, 1976. A253. A judgment was entered in the Clerk's Office of this Court on October 22, 1976.

In response to Judge Cannella's opinion and the judgment entered pursuant thereto, Coleman moved for a new trial and for leave to amend the already amended complaint herein by the addition of a new count, to conform to the evidence adduced at trial, pursuant to Fed. R. Civ. P. 59(a)(2) and 15(b).^{*} This motion was denied. A 275.

^{*} This "joint motion" should really have been considered as a motion to amend the complaint only, since Coleman asserted at page 5 of his supporting memorandum that he "is not seeking the introduction of new or additional evidence or testimony but is prepared to stand on the present state of the record." Defendants assumed this joint motion was made for the purpose of satisfying the Second Circuit's rule that a motion for Rule 15(b) relief must be made in connection with an application

POINT I

COLEMAN'S POST-JUDGMENT MOTION WAS NOT
MADE IN A TIMELY MANNER AND THE PRECONDITIONS
TO THE GRANTING OF RULE 15(b) RELIEF WERE NOT MET.

A. COLEMAN WAS GUILTY OF GROSS LACHES.

As noted above, this action was commenced on April 30, 1971 with the filing of a complaint with the United States District Court for the Northern District of Illinois. The original complaint herein contained one cause of action and requested omnibus relief. Thereafter, Coleman amended his complaint to state four causes of action, none of which can be deemed a cause of action for conversion. See STATEMENT OF FACTS, supra.

In 1972, this case was transferred to the United States District Court for the Southern District of New York after defendants' motion to change venue was granted. On May 8, 1975, Judge Cannella issued an Endorsement and Order denying defendants' motion for leave to file and serve a third-party summons and complaint, the granting of which was within the discretionary powers possessed by the District Court pursuant to Rule 16 of its own Civil Rules. In denying the defendants' motion, the under Rule 59(a) to open the judgment if made after a judgment has been rendered. Markert v. Swift & Co., 173 F.2d 519 (2nd Cir. 1949); Republic of China v. National City Bank of New York, 14 F.R.D. 186 (S.D.N.Y. 1953- Kaufman, J.)

the Endorsement and Order read, in part:

"....This is an ancient case. It was commenced in the Northern District of Illinois in 1971 and was transferred to this Court in 1972. The action is one which comes within the purview of the 'crash program' adopted by the Board of Judges of this Court to expedite the disposition of old cases. It must be tried or otherwise disposed of by July of this year.

"....The granting of the instant motion would undoubtedly delay the disposition of this old case and affront the purposes and spirit of the 'crash program'. No adequate reason has been advanced to excuse the nonjoinder of these third parties at an earlier state of these proceedings. Accordingly, on the exercise of our discretion, the motion is hereby

"Denied."

The case was tried on August 4, 1975 by Judge Cannella without a jury. Judge Cannella rendered his Opinion dated October 18, 1976 and a judgment pursuant to that decision was entered on October 22, 1976. The post-judgment motion followed.

In short, the motion to open the judgment and amend the complaint was brought on five and one-half (5-1/2) years after this action was commenced, five (5) years after Coleman served an amended complaint and one and one-third (1-1/3) years after the trial of this action.

Coleman's counsel had and took advantage of an opportunity to amend the complaint. When it did so, it did not deem it wise to insert a cause of action for conversion. Perhaps, the reason for not doing so was that the cause of

action was barred by the Statute of Limitations on April 30, 1971.* Perhaps, it was due to an inadvertent mistake. But whatever the cause, Coleman had chosen his counsel and they had plotted their course. Not once during the pre-trial or post-trial period did Coleman submit that either or both defendants were liable on a conversion theory. This was the defendants' belief and it was obviously the understanding of Judge Cannella. In footnote 17 to his Opinion of October 18, 1976, Judge Cannella wrote:

"The Court notes that there is no contention that Golkin's acts constituted the tort of conversion." A 273.

Indeed, the defendants respectfully submit that if Judge Cannella had not inserted this footnote in his Opinion, Coleman and his counsel never would have thought to raise the arguments encompassed by the post-judgment motion.

It can hardly be said that an application to amend the complaint to conform to the proofs adduced at trial is timely when made a full 15 months after the trial was held. If Coleman genuinely believed the proofs at trial exceeded the scope of the pleadings, then the motion should have been made at trial or shortly thereafter and not 15 months after the last words in

* See POINT I, sub. C., infra.

open court were spoken. This gross tardiness on Coleman's part is compounded by the fact that very little if any new testimony was revealed at the trial of August 4, 1975. On that date, the parties stipulated that transcripts of the pre-trial depositions taken in this case be received into evidence. Tr. 27, 28, 29, 101. The only new issue which was raised at the actual trial was the physical whereabouts of Coleman from the time he left the employ of the corporate defendant's predecessor, in name until the time of trial. Tr. 73f. The issue of Golkin's knowledge of Coleman's rights had been ventilated at the depositions which were held in May and July of 1971.

Just as defendants' motion for leave to file and serve a third-party summons and complaint was denied on the grounds it would "affront the purposes and spirit of the 'crash program'" promulgated by this Court and because no adequate reason (other than inadvertence) had been advanced to excuse the non-joinder at an earlier stage, the same considerations should have and did control the disposition of the within motion. Granting the motion and opening the judgment would have offended the purposes and spirit of the 'crash program' and Coleman offered no excuse other than inadvertence for failure to make this motion at a much earlier date, especially in view of Coleman's having already filed one amended complaint herein. Defendants respectfully submit that this inadvertence was inexcusable.

No substantial right of Coleman's was prejudiced.* Assuming arguendo, and arguendo only (see POINT II, infra), that plaintiff's theory of conversion has merit, then the only right of Coleman which would have been prejudiced was his right to have had the opportunity to participate in the exercise of the Amco option held by the corporate defendant. As will be shown below, this is a right of little monetary value and certainly is not constitutional in dimension. This is not a criminal or civil rights matter where truly substantial rights are involved. Indeed, Coleman may suffer if he cannot collect the \$80,000 judgment which he has obtained against the corporate defendant, but it will be his pocketbook and none of his substantial rights which will suffer.

The post-judgment motion was properly denied because Coleman was guilty of gross laches as described above, in its bringing.

B. THE PRECONDITIONS TO RECEIVING RULE 15(b) RELIEF WERE NOT MET.

The first sentence of Rule 15(b) reads as follows:

* Coleman asserted that no substantial right of Golkin would have been prejudiced, but that only he had suffered. Defendants ask what right of Coleman's had been prejudiced? Golkin had suffered enormously in that a large portion of his resources had been rendered non-transferable by the institution of this action and he had been subject to the normal harassment and strain of being a defendant.

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." (emphasis supplied)

Coleman does not assert that either defendant expressly consented to trying the issue of whether a common law conversion has occurred, nor could he. Rather, Coleman alleged that the issue was tried with the implied consent of the parties. This allegation was wholly without merit.

Neither the defendants nor the plaintiff believed the issue of common law conversion was raised at the trial herein, and Judge Cannella so found in his Opinion dated October 18, 1976, footnote 17:

"The Court notes there is no contention that Golkin's acts constituted the tort of conversion." A 273.

This finding, which is the law of the case, established that the issue of common law conversion was not raised at the trial herein. As Coleman admits in his brief, page 16, the fact that a cause of action for common law conversion is similar to the legal theories actually advanced by the plaintiff is a mere coincidence. Obviously if the issue was not raised, it could not have been tried with the express or implied consent of the parties.

Defendants only wish to add that if it were held that the issue of common law conversion were raised, no inference of implied consent could be made from defendants' failure to object to the evidence which was ultimately admitted at the trial herein. The reason that the defendants did not object to that which was admitted into evidence is that those items were properly admissible (at least, the defendants so believed) in support of the four causes of action which were actually raised by the pleadings and litigated.

The precondition to the granting of Rule 15(b) relief, namely that issues not raised by the pleadings be tried by express or implied consent of the parties, was not met and the post-judgment motion was properly denied.

C. THE POST-JUDGMENT MOTION WAS NOT TIMELY IN THAT COLEMAN SOUGHT TO INSERT A CAUSE OF ACTION WHICH WOULD HAVE BEEN TIME-BARRED IF IT HAD BEEN INCORPORATED IN THE ORIGINAL COMPLAINT.

The rule is that an amendment to a complaint will not be allowed to insert a cause of action which would have been time-barred had it been inserted in the original complaint, even though it arises from the same transactions or events alleged in the complaint. Stafford v. Railroad Transit Co., 165 F.2d 920 (3rd Cir.1948).

In Stafford, supra, the plaintiff was not allowed to amend this complaint to include a cause of action for wrongful death, even though the original pleadings in negligence set forth all the allegations necessary to sustain a cause of action for wrongful death. Although the negligence action was not barred when the case was commenced, the wrongful death action would have been and the motion to amend the complaint was denied.

The same considerations compelled a denial of Coleman's post-judgment motion to amend his complaint.

A cause of action for conversion under New York's common law is governed by the three-year Statute of Limitations prescribed by New York Civil Practice Law and Rules (CPLR) §214. Klein v. Bower, 421 F.2d 338 (2nd Cir. 1970); Schreibman v. Chase Manhattan Bank, 15 App. Div.2d 769, 224 N.Y.S.2d 977 (1st Dept. 1962).

Coleman alleged that the conversion occurred upon Golkin's refusal to offer Coleman a participation in the exercise of the Amco option which occurred in December, 1967. This action commenced with the filing of the complaint with the District Court in Illinois on April 30, 1971. Fed. R. Civ. P. 3. Since Coleman claims the conversion was wrongful (and not innocent), because Golkin allegedly had knowledge of Coleman's rights when the Amco option was exercised, no demand

by Coleman was required and the conversion occurred upon the exercise of the Amco option without Coleman being offered the chance to participate and become a beneficial owner. Nat Koslow, Inc. v. Bletterman, 23 Misc.2d 340, 197 N.Y.S.2d 583 (Sup.Ct., N.Y.Co., 1960); Del Piccolo v. Newburger, 9 N.Y.S.2d 512 (App. Term, 1st Dept., 1939).

In Schreibman v. Chase Manhattan Bank, supra, the plaintiffs complained that the defendant bank had received deposits from its customer and used the deposits to satisfy the indebtedness of the customer, knowing all along that the plaintiffs were the rightful owner of the deposits. The deposits were the proceeds of the sale of stock realized when a sale was effected by the bank's customer who was a broker. The stock was owned by the several plaintiffs, some of whom were infants. The court held that any claim by the adult plaintiffs for conversion*, which ran from the time the deposits came into the possession of the bank with alleged knowledge of the plaintiff's rights, was barred by the three-year Statute of Limitations. The plaintiff's separate claim based on the theory of moneys had and received was subject to the six-year statute of limitations and not the three-year statute, even though the facts which constituted a cause of action for

* The Statute of Limitations was tolled as to the non-adult plaintiffs because of their infancy.

for conversion were exactly the same as the facts which stated a cause of action for moneys had and received. The plaintiffs were allowed to proceed on any theory which they elected.

In this instance, the plaintiff had elected not to proceed on a conversion theory since he had never pleaded it or otherwise advanced it. But in any event, the cause of action would have been time-barred if it had been inserted in the original complaint and Coleman should not have been and was not allowed to amend his complaint to interpose the claim after judgment had been rendered. Stafford v. Railroad Transit Co., supra. Alternatively, the Statute of Limitations ran from the time the suit was instituted until the post-judgment motion was made. In fact, the Statute ran almost two full times.

Coleman's reliance on the tolling provisions of CPLR §206(a)(1) is misplaced. Said section only applies where demand is necessary to entitle a person to commence an action. As was noted above, demand is not necessary where the alleged conversion is wrongful, i.e., when done with knowledge and in contravention of the plaintiff's right. It was a premise of the post-judgment motion that Golkin had knowledge of Coleman's right in late 1967 and this premise permeates Coleman's appellate brief, as well.

In any event, if CPLR §206(a)(1) were deemed applicable, then the time within which the action must be commenced is computed from the time the plaintiff discovered or should have discovered the facts upon which the right

depends. Since Coleman had notice by the very terms of the Nominee Agreement that the Amcc option would have to be exercised by December 31, 1967, (if it were exercised at all) then he knew, or should have known, that the conversion, if indeed there was a conversion, occurred in 1967 and should have discovered the fact.

The tolling provision of CPLR §206(a)(1) is obviously intended to apply to those cases where a plaintiff has no means of learning that a conversion has occurred. Such is not the case in this instance, since all that Coleman had to do was to pick up a telephone or to write a letter inquiring as to the status of the Amco option.

Although, the defendants do not believe that the issue of conversion was ever in this case, lest their silence be deemed an admission, they will show forthwith that no conversation ever occurred.

POINT II

COLEMAN'S POST-JUDGMENT MOTION FAILED ON THE MERITS BECAUSE COLEMAN DID NOT ALLEGE FACTS, WHICH, IF TRUE, WOULD CONSTITUTE THE TORT OF CONVERSION UNDER THE COMMON LAW OF NEW YORK.

Defendants will not bore the Court with a hornbook recitation of the elements of the tort of conversion. There is only one element, conspicuous by its absence, which need have any bearing on the disposition of the merits of this

case. To establish a cause of action for conversion, the plaintiff must show legal ownership or a superior right of possession. AMF Incorporated v. Algo Distributors, Ltd., 48 App. Div.2d 352, 369 N.Y.S.2d 460 (2nd Dept. 1975). It is that element which distinguishes this case from every case cited by Coleman.

An equitable lien is not a sufficient interest upon which to maintain a cause of action for conversion of that which is covered by the lien, even though the lien may be specifically enforceable. McCoy v. American Express Co., 253 N.Y. 477, 171 N.E. 749 (1930) (Cardozo, J.). The vitality of the McCoy holding has not been diminished by the passage of years. Miller v. Wells Fargo Bank International Corp., 406 F. Supp. 452 (S.D.N.Y. 1975). The McCoy holding is easily understood since an equitable lien does not give rise to legal ownership or a right of possession.

On page 6 of Coleman's supporting memorandum below, referring to the amended complaint herein, Coleman admitted that at best he had an equitable lien as to the property in question. And clearly, Coleman is correct. The Amco option was non-transferable and non-assignable and therefore Coleman, who did not own the option, could never obtain legal ownership or possession of the stock. Pierpoint v. Hoyt, 260 N.Y.26, 182 N.E. 235 (1932), cited by Coleman, is therefore not on point.

The other cases cited by Coleman similarly miss the mark. In Hinkle Iron Co. v. Kohn, 229 N.Y. 179, 128 N.E. 113 (1920), the defendant, as president of a contracting corporation, assigned to the plaintiff some funds which might become due to the corporation. The corporation ultimately received the funds, but they were never paid over to the plaintiff. The Court found that a cause of action for conversion had been properly pleaded. In Hinkle, unlike in this case, the plaintiff, by virtue of the assignment had either legal ownership or a right of possession with respect to those funds.

Furthermore, contrary to Coleman's contentions at page 19 of his brief, the Court in Hinkle did not hold the defendant liable by virtue of piercing the corporate veil. The defendant was not held to be derivatively liable for the actions of the corporation; he was held individually liable for having prevented the plaintiff from receiving that to which it had a legal, not equitable, right. Coleman's attempt to bring its claim of conversion within the ambit of Count Four of the within amended complaint is wholly without basis.

In this case, even if we assume that Coleman would have participated in the exercise of the Amco option, Coleman's interest in the stock remained equitable at best and as such did not constitute the basis for a cause of action in conversion. McCoy v. American Express Co., supra.

Indeed, if there has been a conversion in this case, at most there was a conversion of Coleman's opportunity (i.e., option) to participate in the exercise of the Amco option. It is pure speculation that the plaintiff would have exercised his option and tendered the \$10,000 which was a prerequisite to the creation of this alleged equitable lien or interest. Testimony on this point was properly excluded upon the objection of defendants' counsel. See Tr 48-49.

If we concede for purposes of this argument, that the defendants did convert Coleman's option to participate in the exercise of the Amco option, then we must ask what was the value of this option possessed by Coleman. Apparently, during the pre-exercise period, Coleman's option, or sub-option as it might more properly be termed, had no value, since Coleman never included it on his financial statement. In fact, Coleman admitted that he never followed the performance of the Amco stock on the market and never made any effort to learn whether the Amco option had been exercised, even though he knew or should have known that December 31, 1967 was the last day on which that option could be exercised. Clearly, Coleman genuinely did believe the sub-option he held had no value. In retrospect, Coleman was obviously wrong and Coleman was trying to capitalize on the 20/20 vision of hindsight to reap a windfall at the expense of these defendants. Tr 51f.

Indeed, this was the only evidence deduced as to the value of Coleman's sub-option and that evidence is Coleman's own admission that the sub-option had no value. Since Coleman stands on the present state of the record (Coleman's brief, p. 15), there is nothing upon which an award of damages for conversion of the sub-option can stand.

Coleman's proposed amendment failed to state a cause of action for common law conversion and his post-judgment was properly denied.

POINT III

THE NOMINEE AGREEMENT BETWEEN THE PARTIES, WHETHER WRITTEN OR ORAL, IS BARRED BY THE STATUTE OF FRAUDS.

A. THE WRITTEN AGREEMENT IS INVALID UNDER THE NEW YORK GENERAL OBLIGATIONS LAW, §5-1105.

The New York General Obligations Law, §5-1105 provides:

"A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed." (emphasis supplied).

See also Weyerheuser Co. v. Gershman, 324 F.2d 163 (2nd Cir. 1963).

A promise given for past consideration must be in writing to be enforceable. Schiff v. Kirby, 22 Misc.2d 786, 194 N.Y.S.2d 695 (Sup.Ct., West Co., 1959). In Schiff, the plaintiff secured a business opportunity for the defendant. The defendant promised to give the plaintiff 4% of the proceeds of the venture. The court noted the necessity for the defendant's promise to the plaintiff being in writing.

Likewise in this instance, the promise of Divine & Fishman must be in writing to be enforceable. Divine & Fishman's promise to give Coleman a participation in the Gellman/Amco option is based on services allegedly rendered to the corporation four to five months in the past. The corporation's promise is therefore made for a past consideration.

The Nominee Agreement is insufficient to satisfy the requirements of the N.Y. Gen. Oblig. L., §5-1105, quoted above. The writing fails to express the past consideration and is therefore defective. The writing must set forth the nature or character of the product or service for which plaintiff seeks payment. Persico Oil Co. v. Levy, 64 Misc.2d 1091, 316 N.Y.S. 2d 924 (Sup.Ct., Albany Co., 1970). The writing in question, the Nominee Agreement, does not satisfy this requirement.

AN ORAL AGREEMENT BETWEEN THE PARTIES WOULD BE BARRED
BY THE U.C.C. STATUTE OF FRAUDS.

If, as the defendants hope, this Court will find that the written agreement between Coleman and Divine & Fishman is null and void, the issue arises whether an oral agreement between the parties would be binding. POINT II, sub.A., supra, proves that the promise must be in writing because it is a promise made for past consideration. That subdivision of POINT III and the other subdivisions of POINT III, which follow, will set forth other reasons why an oral agreement between the parties is insufficient to bind them.

Section 8-319 ("Statute of Frauds") of the UCC provides in part:

"A contract for the sale of securities is not enforceable by way of action or defense unless

- (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price,..."

In this instance, Coleman seeks to enforce an alleged promise on the part of Divine & Fishman (succeeded by Golkin, Bomback) to sell to him 5,000 shares of Amco stock if and when the corporation exercised its option to purchase. The fact that Coleman was to receive beneficial ownership without record title would not minimize the fact that a sale was to

occur or that Coleman would receive a valid title. The UCC, Article 8 on Investment Securities does not distinguish between the sale of legal title and the sale of equitable title. Equitable title is as protectible as legal title. See Stephens v. Evans, 190 Misc. 922, 75 N.Y.S.2d 909 (Sup.Ct., Steuben Co., 1947). Nor does it matter that this promise to sell stock arose in the context of an alleged employment relationship. Bingham v. Wells, Rich, Greene, Inc., 34 App. Div. 2d 924, 311 N.Y.S. 2d 508 (1st Dept., 1970). That it might serve as compensation does not render the transaction a non-sale.

Should Coleman try to argue that he does not seek to enforce an alleged promise to sell stock, but rather a promise to sell an option, the same result would be reached. If the option itself is a security, then an agreement to sell an option must likewise be in writing under UCC, §8-319(1).

The New York courts are split over whether an option to sell a security is itself a security. Some hold that it is a security (Mortimer B. Burnside & Co., v. Havener Securities Corp., 25 App. Div. 2d 373, 269 N.Y.S.2d 724 [1st Dept., 1966]) and some reach a contrary result (Cohn, Ivers & Co. v. Gross, 56 Misc.2d 491, 289 N.Y.S.2d 301 [Sup.Ct., Queens Co., 1968]). In Cohn, Ivers & Co., supra, the court, while holding that the sale of an option is not the sale of a security under UCC, §8-319, held the sale must still comply with the writing requirement of UCC, §1-206. UCC, §1-206 holds that an

agreement to sell personal property (e.g., an option) worth over \$5,000 must be in writing to be enforceable. It is not disputed that Coleman seeks to enforce an alleged agreement to sell property worth over \$5,000. He seeks to compel a sale of property for \$10,000. Therefore, if the Court finds the written Nominee Agreement to be void, it must likewise find unenforceable an oral agreement embodying the same terms.

C. AN ORAL AGREEMENT BETWEEN THE PARTIES WOULD BE BARRED BY THE NEW YORK GENERAL OBLIGATIONS LAW, §5-701(10).

The N.Y. Gen. Oblig. L., §5-701(10) provides that:

"...a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest..."

must be in writing to be enforceable. A sale of less than a majority of the voting stock can nevertheless be the sale of a "business opportunity." Minichiello v. Royal Business Funds Corp., 18 N.Y. 2d 521, 223 N.E. 2d 793, 277 N.Y.S.2d 268 (1966).

Coleman has negotiated a business opportunity on two levels if he has performed the services as alleged by him. First, he has negotiated a business opportunity in arranging the Gellman merger and second, he has negotiated a business opportunity in obtaining the Gellman/Amco option for Divine & Fishman.

As the court in Minichiello, supra, noted:

"In its brief recommendation to the Legislature, the Law Revision Commission stated its reason for proposing subdivision 10 of section 31: 'In recent years there have been a substantial number of reported cases of claims for commissions for services rendered in the sale of a going business or a business opportunity. Under existing law there is no requirement that business brokers' contracts for commissions be in writing. The nature of the transactions is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted, and employers often seek to escape liability by denying the fact of employment. These controversies are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts' (1949 Report of N.Y. Law Rev. Comm. [N.Y. Legis. Doc., 1949, No. 65(G), p.615]).

Thus, the commission believed that the 'danger of erroneous verdicts' in allowing a jury to determine this type of case on oral testimony warranted the writing requirement." Id., 18 N.Y.2d at p. 526, 277 N.Y.S.2d at p. 271.

The facts of this case present exactly the type of situation that the Law Revision Commission found troublesome and precarious. The reasons it found compelling to seek the passage of N.Y. Gen. Oblig. L., §5-701(10) are precisely the policy reasons that this Court should use to find against Coleman in this matter.

POINT IV

COLEMAN DID NOT HAVE STANDING TO BRING
THIS ACTION UNDER THE NEW YORK BUSINESS
CORPORATION LAW, §§719 and 720.

Count II of the Amended Complaint herein asserts a cause of action under the Business Corporation Law, §§719 and 720. It is rudimentary that only a judgment creditor has standing to pursue a remedy under the aforementioned sections. Kendall v. Oakland Golf Club, 123 N.Y.S.2d 907, aff'd 282 App. Div. 1059, 126 N.Y.S. 2d 379, aff'd 307 N.Y. 753, 121 N.E. 2d 554 (1954).

Coleman was not a judgment creditor at the time the liquidation was made or when this suit was instituted. In fact, when the plan of liquidation was adopted in 1965 (Ex.4-3, A 224) neither Golkin nor anyone else associated with Golkin, Bomback had any hint of Coleman's alleged rights. Tr 122-123, A 136. When the plan of liquidation was adopted, Golkin and the others who voted in favor of adoption did so with the good faith belief that all claims against Golkin, Bomback had been satisfied. To now hold Golkin personally liable would run counter to the purpose of the statutes cited. Sections 719 and 720 of the Business Corporation Law were intended to protect judgment creditors from directors who would unfairly jeopardize their property rights. Male v. Pure Water Co. of Buffalo, 176 Misc. 743, 27 N.Y.S. 2d 984, aff'd 261 App. Div. 1050, 27 N.Y.S. 2d 1023 (4th Dept. 1941).

Thus, where the defendants acted in good faith, where Coleman was not a judgment creditor of Golkin, Bomback and where the defendants had no reason to know of the alleged Nominee Agreement, the defendants, and Golkin in particular, should not be held liable.

Coleman's argument at page 32 of his brief that New York courts have abandoned the judgment requirement where obtaining a judgment would be useless misstates the law. In support of the argument, Coleman chain-cites a number of cases. In Bonhart v. Braunwarth, 81 N.Y.S.2d 739 (Sup.Ct., N.Y. Co., 1948), the first case cited by Coleman in support of his argument, all the other cases cited by Coleman are chain-cited. Unfortunately, Coleman apparently failed to read the remaining cases, because one of them, Steele v. Isman, 164 App. Div. 146, 149 N.Y.S. 488 (1st Dept. 1914), is dispositive in the defendants' favor.

In Steele v. Isman, supra, the plaintiff argued that he did not lack capacity to sue under the forerunners of BCL §§719 and 720, even though he was not a judgment creditor. His argument, exactly the same argument advanced by Coleman herein, was that the obtaining of a judgment would be futile since the corporation had been dissolved. The court rejected this argument and dismissed the complaint because the plaintiff was not a judgment creditor.

What Coleman fails to comprehend is that the exception does not apply where the satisfaction of a judgment would be futile. Indeed, the reason for the statutes is that satisfaction of the judgment against the corporation is made impossible because of some wrongful act of the corporation's directors. The exception only applies where it would be impossible or futile for the plaintiff to obtain a judgment.

The only time the exception advanced by Coleman has been applied is where the corporation which would have to be sued had been thrown "into the hands of a receiver, with the usual restraining order to prevent any creditor from seeking redress against it." John H. Giles Dyeing Machine Co. v. Klauder- Weldon Dyeing Machine Co., 198 App. Div. 564, 190 N.Y.S. 726, 730 (3rd Dept. 1921), rev'd on other grounds, 233 N.Y. 470, 135 N.E. 854 (1922). See also Lilienthal v. Betz, 108 App. Div. 222, 95 N.Y.S. 849 (1st Dept. 1905).

In Levy v. Paramount Public Corp., 149 Misc. 129, 266 N.Y.S. 271 (Sup.Ct., N.Y. Co., 1933) aff'd, 241 App.Div. 711, 269 N.Y.S. 997 (1st Dept. 1934), also cited by Coleman, the plaintiff's complaint was dismissed. The plaintiff lacked standing to sue because he was not a judgment creditor and had not shown that the obtaining of a judgment would be impossible.

Bonhart v. Braunwarth, supra, which applies the rule on which Coleman seeks to rely does not state the relevant facts that allowed the rule to be invoked in that instance and, therefore, its precedential value is dubious at best.

Coleman's statement at page 42 of his brief that he now has a judgment against the corporate defendant is of no avail or relevance since he did not have judgment creditor status at the time the liquidating distribution was made in 1965, when the distribution from the proceeds of the sale of the Amco stock was made in 1971, or when this action was instituted in 1971.

Coleman's reliance on BCL §510 is misplaced, since said section does not apply to liquidating dividends. Dissolution of a corporation is governed by BCL, Art. 10. The quote from 2 White on New York Corporations, ¶510.01, p. 5-205 (13th ed. 1974) at page 36 of Coleman's brief shows that said section is meant to apply to dividends or distributions from on-going enterprises. The section limits the source of such dividends or distributions to capital surplus.

Similarly, Coleman's reliance on BCL §717 is also misplaced. Said section deals with the duty of directors to the corporation and its stockholders to make prudent investments and not to waste assets. It does not deal with the propriety of a decision to dissolve a corporation. The cases cited by Coleman at page 33 of his brief bear witness to this position.

Indeed, Coleman can hardly be said to challenge the prudence of Golkin's investment. It was the prudence of his investment that brought rise to the enormous profit which Coleman now seeks to obtain as a windfall.

And so, Judge Cannella found Golkin not to be individually liable to Coleman. Judge Cannella also found that these sections "have as their specific purpose the protection of creditors with claims that have accrued prior to the alleged improper transfer (citations omitted)." A 263 (emphasis supplied). As Judge Cannella found the alleged improper transfer created the claim:

"The situation before the Court is not one in which it is alleged that a corporate officer or director interfered with a creditor's ability to enforce a preexisting obligation of the corporation. Rather, it was the complained-of actions that created the liability to Coleman. Thus, under New York laws [BCL §§510, 717, 719 and 720] are inapplicable to the instant controversy". A 264 (emphasis in original).

The case of Crete Concrete Corp. v. Josephs, 66 Misc. 2d 837, 322 N.Y.S. 2d 935 (Sup.Ct., Rockland Co., 1971) modified, 39 A;p. Div. 2d 543, 332 N.Y.S.2d 601 (2nd Dept. 1972), cited by Coleman with respect to his argument for the application of BCL §719(a) directly against the directors of a corporation by creditors is wrong, since no case before or after has reached a similar holding in a suit by a creditor. In any event, the finding of liability under BCL §719(a) in Crete Concrete Corp. v. Josephs, supra, is dictum at best since the court had already found the defendants therein liable under the New York Debtor and Creditor Law, §276.

In this instance, the District Court found that Golkin had no fraudulent intent and, in fact, held that Golkin had acted in good faith in spreading the benefits of the Gellman/Amco option to the other Golkin, Bomback shareholders. A 268.

Coleman's position is that he never contacted Golkin, Bomback with respect to the exercise of the Gellman/Amco option, because under the terms of the Nominee Agreement, the corporation was obliged to contact him. Yet, nowhere was it ever shown by Coleman that Golkin had any knowledge of or had ever seen the Nominee Agreement. It can hardly be said that Golkin was negligent with respect to Coleman's rights.

Nevertheless, Coleman seizes on the District Court's use of the word "cavalier" in describing Golkin's actions with respect to the Gellman/Amco option. Coleman further suggests that the word "cavalier" was used to describe Golkin's actions toward Coleman. Coleman's brief, page 37. This is simply incorrect. Judge Cannella's use of the word "cavalier" (A267) merely described Golkin's actions towards Golkin, Bomback, the corporation. The full quote is:

"...while Golkin's actions with respect to the Gellman option may have been rather cavalier, they were not predatory, malicious or against the interests of the corporation; nor were they 'without legal or social justification' (citations omitted)." A 267.

Thus Coleman lacked standing to sue under BCL §§719 and 720 and their related sections, but, in any event, those sections were not even applicable to the facts at bar.

POINT V

COLEMAN IS ESTOPPED FROM EXERCISING HIS ALLEGED RIGHTS UNDER THE NOMINEE AGREEMENT.

A. COLEMAN'S TENDER OF HIS SHARE OF THE GROSS EXERCISE PRICE WAS MADE IN BAD FAITH.

Coleman was allegedly the individual most intimately involved in the transaction which gave rise to the Gellman/Amco option held by Divine & Fishman and later Golkin, Bomback. As such, he must have been intimately aware of the

facts surrounding the Option Agreement. In entering into the Nominee Agreement (A 1), Coleman was put on notice that the option was exercisable between January 1, 1963 and December 31, 1967. Therefore, Coleman knew or should have known that if the option had been exercised at all, it must have been exercised by December 31, 1967. At no time did he attempt to communicate with Golkin, Bomback to determine if the option had been exercised and to offer to tender his pro rata share of the gross exercise price. Tr 64-65. He was either uninterested in or unwilling to share in the risks attendant upon exercising the option. This was probably because while the option price was \$2.00 per share for restricted Amco stock, the free trading Amco stock was selling for the same price (Tr 114, 125) at the time the option was exercised.

Although Coleman underwent numerous changes of address, he never informed the corporation of his whereabouts. TR 73. Coleman never considered his alleged interest an asset (Tr 51-53), at least not until after the stock was sold and the huge profit secured. It was not until Coleman had learned that the stock had been sold for a substantial profit that he offered to tender his share of the gross exercise price. This was more than four (4) years after Coleman knew or should have known that the option had been exercised. Coleman is carefully trying to avoid the risks of the investment while reaping the

fruits of the defendants' having taken the risks. Coleman is simply entering the scene and trying to exchange \$10,000 for \$90,000. He is acting in bad faith and is estopped from trying to exercise his alleged rights under the Nominee Agreement. We need hardly speculate what Coleman's response would have been had the Amco stock lost all value and the defendants had requested Coleman to tender his \$10,000.

The Court requires that he who comes before it come with "clean hands". The litigant must show good faith, fairness and unrightness. Fogel v. Bolet, 194 Misc. 1019, 91 N.Y.S.2d 642 (Sup.Ct., N.Y. Co., 1949). It was in bad faith that Coleman came forward with his offer to tender \$10,000 seeking a windfaull ~~profit~~ of \$80,000.

B. COLEMAN IS BARRED FROM ASSERTING HIS ALLEGED RIGHTS UNDER THE NOMINEE AGREEMENT BY LACHES.

To the extent that Coleman pursued a remedy against Golkin personally and against Golkin, Bomback for an accounting and to recapture its assets, Coleman was seeking equitable relief. Hearn 45 St. Corporation v. Jano, 283 N.Y.145, 27 N.E. 2d 817 (1940). The neglect to promptly assert an equitable right, if such neglect causes prejudice to the adverse party, is held to operate as a bar to the equitable remedy. Coit v. Campbell, 82 N.Y. 509 (1880).

In this instance, Coleman's delay of over four years severely prejudiced the defendants. Coleman knew or should have known that if the Gellman/Amco option had been exercised at all that it was exercised by December 31, 1967. The Nominee Agreement which he signed indicated that was the last possible day for the holder to exercise its rights. Al. Coleman made no effort to ascertain whether the option had been exercised or if such effort were made, Coleman made no attempt to assert his alleged rights until more than four (4) years later. At that point, the profits had been realized, Coleman was not subjecting himself to any risk in tendering his share of the gross exercise price, and Golkin, Bomback had already adopted a plan of liquidation and distributed all its assets on the good faith belief that there were no creditors. A 267-268.

Golkin, Bomback is prejudiced by Coleman's excessive delay in asserting his alleged rights, because by having adopted a plan of liquidation (Ex. 4-3) and by having distributed all its assets, Golkin, Bomback will not be able to satisfy the full amount of the judgment against it.

Golkin himself is prejudiced by Coleman's delay because he is now being asked to assume to full liability for sums that might be due to Coleman when, in fact, Golkin only participated to the extent of 37.6% of the exercise of the

option. Golkin will not be able to seek contribution from those who participated in the exercise of the option and were not directors, or, being directors, are not found personally liable for any amount which might be owing to Coleman.

People v. Equitable Life Assurance Society of the United States,
124 App. Div. 714, 109 N.Y.S. 453 (1st Dept. 1909).

Because of Coleman's excessive delay in asserting his alleged rights under the Nominee Agreement and because of the severe prejudice which results to the defendants as a result thereof, Coleman should be estopped from bringing this action on the equitable ground of laches.

CONCLUSION

WHEREFORE, for the reasons given, the Defendants-Appellees, Golkin, Bomback & Co., Inc. and Saul Golkin, respectfully request this Court to affirm the decision and judgments below in all respects, to grant them the costs and disbursements of this appellate proceeding, and such other and further relief as to this Court may seem just and proper.

We have not briefed those arguments advanced by Coleman below, but which are not pressed by Coleman on appeal.

Respectfully Submitted,
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OF COUNSEL:
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN COLEMAN,

Plaintiff-Appellant, :

- against - :

GOLKIN, BOMBACK & CO., INC.,
A Corporation; and SAUL
GOLKIN, :

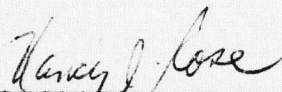
Defendants-Appellees. :

On Appeal from the United States District
Court for the Southern District of New York

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

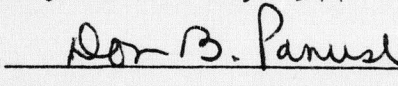
NANCY J. ROSE, being duly sworn, deposes and say: I am not a party to the action; I am over the age of 18 years of age, and reside at New York, N. Y. On March 14, 1977 I served two copies each of the brief of defendants-appellees by mailing the same in sealed envelopes with postage prepaid thereon, in a post office or official depository of the United States Postal Service within the State of New York, addressed to the last known addresses of the addressees as indicated below:

1. Winston & Strawn, Co-Counsel for Plaintiff-Appellant, John Coleman, Suite 5000, One First National Plaza, Chicago, Illinois 60670,
2. Lord, Day & Lord, Co-Counsel for Plaintiff-Appellant, John Coleman, 25 Broadway, New York, N.Y. 10004.



Nancy J. Rose

Sworn to before me, this 14th
day of March, 1977



Don B. Panush

DON B. PANUSH
NOTARY PUBLIC, State of New York
No. 41-5088365
Qualified in Queens County
Commission Expires March 30, 1977

